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James Riley Scrivener v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-0426

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APPELLEE'S BRIEF

539 SW 2d 291

COURT OF APPEALS OF KENTUCKY

FILE NO. 75-426

JAMES RILEY SCRIVENER — APPELLANT

VS.

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
HON. S. RUSH NICHOLSON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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This is to certify that a copy of this Brief has been mailed, postage prepaid, to the Honorable S. Rush Nicholson, Judge, Jefferson Circuit Court, Court House, Louisville, Kentucky 40202; Honorable Edwin A. Schroering, Jr., Commonwealth's Attorney, 12th Floor, Citizens Plaza, Louisville, Kentucky 40202, and Honorable Geoffrey P. Morris, Attorney for Appellant, Jefferson District Public Defender, 1000 Republic Building, Louisville, Kentucky 40202, on this 4th day of August, 1975.

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STATEMENT OF THE QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT ERROR BY HAVING THE APPELLANT STAND TRIAL IN THE DISTINCTIVE ATTIRE OF A PRISONER, THUS DENYING HIM HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

II. DID THE TRIAL COURT COMMIT CONSTITUTIONAL ERROR BY READING INTO EVIDENCE PRIOR CHARGES WHICH WERE DISMISSED OR FILED AWAY WHILE TRYING TO ESTABLISH PROOF OF PRIOR CONVICTIONS?

COUNTERSTATEMENT OF THE CASE

Appellee accepts as substantially correct appellant's statement of the case but reserves the right to supplement its argument with additional factual matter as the need arises.

ARGUMENT

I

TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY HAVING THE APPELLANT STAND TRIAL IN THE DISTINCT ATTIRE OF A PRISONER THEREBY DENYING HIM HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

It is the appellant's contention that he was denied his constitutional right to a fair trial when the trial judge refused to grant appellant's motion for a continuance since he was brought into court in jail clothes and handcuffs. It is unclear from appellant's brief whether or not the constitutional rights to which he makes reference in his argument are those guaranteed him by the federal constitution or the Kentucky constitution. Appellee assumes, however, from the appellant's reliance upon federal case law that the constitutional rights he refers to are those contained in the due process clause of the Fourteenth Amendment to the United States Constitution.

The test to be applied in determining whether or not the trying of a defendant while attired in a prison uniform is prejudicial was stated as follows by the United States Court of Appeals for the 10th Circuit in Watt v. Page, 452 F.2d 1174 (1972) cert. den. 405 U.S. 1070, 92 S.Ct. 1520 following a discussion of Hernandez v. Beto, 443 F.2d 634 (1971) and Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946):

> "We do not hold that the nature of the clothing worn by the petitioner at his trial was inherently prejudicial of his right to a fair and impartial trial. The Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, and in Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284, expresses two basic holdings, first: that '. . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt'; and secondly that not all trial errors which violate the Constitution ' . . .

> automatically call for reversal.' The matter here complained of, if it develops to be in fact an 'error,' can be considered as a 'trial' error for these purposes. Again it is also not an 'error' which automatically calls for reversal if established. It appears that the Supreme Court has placed errors of this nature in a category, and under a standard, somewhat different from that applied under Rule 52 (a), Fed.R.Crim.P. See Little v. United States, 73 F.2d 861 (10th Cir.); Rice v. United States, 149 F.2d 601 (10th Cir.); Wright v. United States, 301 F.2d 412 (10th Cir.); Gay v. United States, 322 F.2d 208 (10th Cir.); and Jennings v. United States, 364 F.2d 513 (10th Cir.). Thus here the inquiry must be made under the reasonable doubt standard." p. 1176

The inquiry must then be whether or not it may be said beyond a reasonable doubt that appellant's right to a fair trial was not prejudiced by going to trial in jail clothing.

In the case at bar proof offered by the Commonwealth established the appellant's guilt overwhelmingly. This was as well as admitted by trial defense counsel when he stated on page five of the transcript of evidence:

> "MR. MORRIS: I want the Court to know that I have recommended that my client consider settling the case for the sixteen years that was offered in view of the evidence that will come forth on the stand."

Appellee submits therefore that any error committed by allowing defendant to be tried in prison clothes was harmless in nature and cost him no substantial prejudice.

In regard to appellant's contention that he was prejudiced by being brought into the courtroom while in handcuffs, this Court responded as follows to a familiar claim

in Murray v. Commonwealth, Ky., 474 S.W.2d 359 (1972):

> "Appellant complains that he suffered prejudice when prior to the commencement of the trial he was brought into the court room and was seen by the jury in handcuffs and shackles. During voir dire examination all of the jurors admitted that they had seen appellant in this condition but, when questioned by the defense, none stated that it would affect his decision as to Murray's guilt or innocence. We hold that this experience did not deny Murray a fair trial. Williams v. Com., Ky., 474 S.W.2d 381 (decided December 17, 1971)." p. 361

Prior to trial in the case at bar the defense's motion for a continuance upon the grounds that the defendant had been seen by the jury in handcuffs was heard in chambers. In ruling upon this motion the trial court stated:

> "THE COURT: You can ask the jury if anyone saw this man come into court. We'll take it from there if any of the jury saw him. Your motion is overruled." (Transcript of the Evidence, hereinafter referred to as T.E., p. 4).

Thus, the trial court gave defense every opportunity during voir dire to question the jury as to whether or not they had observed the defendant in handcuffs and wearing prison garb and what effect if any that would have on their decision. However, the transcript of the voir dire examination of the prospective jurors by trial defense counsel, which appears on pages 11 through 37 of the transcript of the record, reveals that inquiry was not made of any prospective jurors as to the possible prejudicial effect of having seen the appellant in handcuffs and prison clothing. It must be assumed therefore that defense counsel chose not to exercise the opportunity to

so inquire given him by the trial judge and cannot now be heard to complain of any possible prejudice, Murray v. Commonwealth, supra.

II

THE TRIAL COURT DID NOT COMMIT CONSTITUTIONAL ERROR BY READING INTO EVIDENCE PRIOR CHARGES WHICH WERE DISMISSED OR FILED AWAY WHILE TRYING TO ESTABLISH PROOF OF PRIOR CONVICTIONS.

The appellant alleges that the trial court committed constitutional error by allowing the reading of prior charges which were dismissed or filed away while trying to establish proof of prior convictions. We submit that the trial court acted reasonably in allowing Mr. Forbes, Deputy Circuit Court Clerk of Jefferson County, to read the official court orders pertaining to the prior felony convictions of James Riley Scrivener. (T.E., pp. 72-79).

The Commonwealth, by allowing Mr. Forbes to read from the order book, was only attempting to prove the prior convictions upon which the habitual criminal charge was based. Mr. Forbes testified that the appellant was convicted (1) in July of 1968 on four counts of dwelling housebreaking pursuant to his plea of guilty (Transcript of the Record, hereinafter referred to as T. R., p. 73); (2) in December of 1969 for dwelling housebreaking pursuant to his plea of guilty (T.R., pp. 75-76); and (3) in March of 1973 for knowingly receiving stolen property over $100 and possession of burglary tools pursuant to his guilty plea (T.E., p. 77). The Commonwealth,

through the testimony of Mr. Forbes, conclusively established that the appellant had been convicted of a felony for the third time. Therefore he could be given a life sentence pursuant to the habitual criminal statute, KRS 431.190.

In Johnson v. Commonwealth, Ky., 516 S.W.2d 648 (1974) which the appellant cites as supportive of his argument, this Court stated:

> "Proof of prior felony convictions in an habitual criminal case (KRS 431.190) is established by reading into evidence the judgments of prior convictions contained in the order books of the trial court." at p. 649. (emphasis added).

In the case at bar Mr. Forbes stated that he was reading from the official order books of the court (T.R., p. 72). The actual indictments for each offense were not read to the jury. It is the reading of the indictment itself that this Court has considered as error. Thus there was not error in the instant case on the part of the trial court.

In Johnson, supra, this Court stated that if the indictments were read to the jury it would be considered error. However, it should be noted that the judgment in Johnson, was affirmed even though the actual indictments were read to the jury for the reason that a review of the record shows overwhelming guilt and the error was not prejudicial.

The fact that appellant had been convicted on three separate occasions established sufficient evidence to warrant a conviction under the habitual criminal statute. The record in the case at hand established the overwhelming guilt of the appellant and if there was error, it was not to the substantial

prejudice of the appellant. See Taylor v. Commonwealth, Ky., 449 S.W.2d 208 (1969).

Thus, it is the contention of the appellee that the appellant was in no way denied a fair trial. Therefore, we submit that this allegation of the appellant is without merit and should not be considered by this Court.

CONCLUSION

For the foregoing reasons the judgment of the Jefferson Circuit Court should be affirmed.

Respectfully submitted,

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